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August 20, 1997

HAND DELIVERY

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Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Reply Comments in CS Docket No. 97-141*

To the Commission:

Enclosed for filing is one original and nine copies of the Reply Comments of ESPN, Inc. in the above captioned proceeding. Please feel free to contact me with any questions.

Very truly yours,

Michael J. Pierce
Assistant General Counsel

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 97-141
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF ESPN, INC.

David R. Pahl
Michael J. Pierce

ESPN, Inc.
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Bristol, Connecticut 06010-7454

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Competition in the Market for the	)	
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To the Commission:

REPLY COMMENTS OF ESPN, INC.

ESPN, Inc. ("ESPN") hereby responds to the comments filed in the above referenced proceeding that call for the unwarranted extension of the program access rules to non-vertically integrated programmers.[1] As the Commission will no doubt remember, this is not a new issue, even within the context of this annual video marketplace proceeding.[2] And while there are now several new advocates for the position, ESPN believes they bring no new support of any substance to that position.

The Commission has to date appropriately found insufficient cause to take the unprecedented steps urged by these several commenters, steps which would insert the Commission into every programmer-distributor relationship in existence in the multichannel distribution industry.[3] For the reasons set forth below, ESPN believes there

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[1] Notice of Inquiry, CS Docket No. 97-141, FCC 97-194 (released June 6, 1997) (the "Notice").

[2] For example, The Wireless Cable Association International, Inc. ("WCAI") has urged this same unwarranted action in each of the last two annual proceedings. The National Cable Television Cooperative, Inc. did so in last year's proceeding.

[3] For example, the Commission noted in last year's report that the evidence presented by Ameritech New Media, Inc., WCAI and others was insufficient for it "to make any determination concerning the effect, if any, that exclusive arrangements involving non-

continues to be insufficient cause for the Commission to embrace the interventionist role proposed for it by these several commenters.

I. No Compelling Rationale Has Been Put Forward for an Extension of the Program Access Rules to Non-Vertically Integrated Programmers

One theme dominates this year's crop of program access-related comments, although it clearly does not rise even close to the level of a compelling rationale for the proposed overhaul of the program access provisions of Section 628, or its attendant rules. This line of reasoning argues that the multichannel video programming and distribution industries of 1997 are vastly different from those that existed only a few years ago, and that Congress in 1992 simply could not then (nor apparently in 1996) have foreseen today's competitive landscape. The argument continues that, because of these changes, monopsonist cable operators will now have the unforeseen and unprecedented power to compel non-vertically integrated programmers like ESPN to discriminate against or even deny programming to non-cable MVPDs.[4] That, the theory posits, is the reason certain non-vertically integrated programmers are offering their often fledgling services on an exclusive basis, and not as a means of encouraging distribution of those services in an environment in which fierce competition prevails among programming services.[5]

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vertically integrated programmers may have on competition in local markets for delivery of multichannel video programming." *Third Annual Report in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, FCC 96-496 (released January 2, 1997), at 79.

[4] *See, e.g.* Comments of BellSouth Corporation at 12: "[S]ince cable programming services cannot succeed unless they are able to reach a critical mass of subscribers, they will be beholden to the large MSOs (and, correspondingly, under greater pressure not to sell to cable's competitors) as TCI and others tighten their stranglehold over distribution on a national and regional scale."

[5] As the Commission no doubt appreciates, however, an offer of exclusivity is much more likely to be used in the current environment by a programmer in order to encourage a

This year's monopsony theme appears primarily to be the product of several high profile transactions recently announced in the trade and popular press, such as the TCI/Fox/Cablevision arrangements, the Microsoft investment in Comcast and the ASkyB/PrimeStar deal.[6] While ESPN certainly would not discount the visibility of any of these events, we would like to remind the Commission that there are a significant number of non-vertically integrated programmers not parties to these transactions, but which would be swept up in any wholesale extension of the program access rules. While transactions of this type have the ability to draw attention to these issues, we encourage the Commission and Congress to avoid legislating *vis-à-vis* an entire industry on the basis of hypothetical scenarios, hyperbole and the potential occurrence of several transactions, however large they may loom in the press.[7]

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distributor to carry a new and untested service. In addition, we note that one of this year's advocates for extending the program access provisions has itself realized that offering programming on an exclusive basis may significantly advance a distributor's business interests. *See* footnote 17, below.

[6] A sampling of this year's comments: "Since the Commission's last report, a variety of deals among large multiple system operators (MSOs) and programming vendors have occurred or been announced. The effect has been to concentrate control of key programming among a few powerful players in the cable industry." Comments of Bell Atlantic and Nynex at 3 (footnotes omitted). "The FCC's *Notice of Inquiry* has arrived in the wake of transactions that will produce unprecedented horizontal and vertical integration among the largest cable MSOs and create even closer alliances between non-vertically integrated cable programmers and the cable operators whose stranglehold on local distribution is absolutely critical to any programmer's success." Comments of BellSouth Corporation, *et al.* at 2. "Yet, as already recognized by Congress, recent marketplace developments reflect that the Commission's program access rules are in serious danger of becoming entirely inadequate to ensure that wireless cable operators have fair and equitable access to the cable programming that is essential to their survival." Comments of The Wireless Cable Association International, Inc. at 18.

[7] Moreover, as the Commission well appreciates, these transactions will likely be subject to intense scrutiny at various levels of government and the appropriateness of competitive safeguards, if any, will certainly be part of the analysis conducted during those reviews.

Several comments also -- somewhat curiously -- suggest that Congress managed to overlook the non-vertically integrated programmer in crafting Section 628.[8] This, of course, flies directly in the face of the legislative history of that provision as well as its carefully constructed language. As ESPN has noted in previous filings, Congress specifically drafted the program access provisions of the 1992 Cable Act to only reach certain actors that purportedly have the incentive and ability to discriminate against competing distribution technologies. Any suggestion that an inadvertent "loophole" favoring non-vertically integrated programmers was simultaneously created, and which has only recently become apparent, is simply not borne out by the language, the history or the clear legislative intent of Section 628.

In summary, neither of these themes should strike a resonant chord with the Commission in this proceeding. Instead, ESPN believes that Congress was sufficiently skilled and knowledgeable in 1992 (and certainly in 1996) to craft program access provisions that both (1) specifically and purposefully excluded non-vertically integrated satellite cable programmers and (2) were farsighted enough to contemplate today's competitive landscape.

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[8] For example: "BellSouth submits that to preserve competition and thus promote the public interest, the FCC should follow Congress's lead and close loopholes in its program access rules which allow cable operators to avoid selling their product to cable's competitors." *BellSouth Comments* at 11 (emphasis added). "In addition, the Commission should consider ways to address potential "loopholes" in its program access rules that can cause much competitive mischief." Comments of DirecTV, Inc. at 5.

II. No Meaningful Evidence of Anti-Competitive Harm, Actual or Prospective, Has Been Offered to Support a Major Regulatory and Legislative Overhaul of the Program Access Regime

The Commission's *Notice* specifically requested "information that would help in assessing whether the program access rules should be expanded or contracted in their coverage."[9] ESPN respectfully submits that the comments discussed herein fail not only to provide such information, but fail even to offer the minimum evidentiary foundation required for Commission consideration of such revamping.

For example, the comments submitted by Ameritech New Media, Inc. recite a list of purportedly exclusive agreements (*e.g.*, TV-Land, FX, Eye on People) and then summarily conclude by stating that the adverse impact of such exclusivity on Ameritech "is significant."[10] Similarly, comments filed jointly by Bell Atlantic and Nynex do little more than assert that "if vendors of key programming unreasonably discriminate in favor of incumbent cable operators . . . consumers lose the benefits of competition among video programming providers[.]"[11] (The *Bell Atlantic/Nynex Comments* do, however, go on to make the extraordinary suggestion that the program access rules be applied on a content-specific basis to a category labeled "unique programming."[12])

The *BellSouth Comments* are more interesting in that they posit the somewhat surreal theory that the recent Fox/TCI/Cablevision dealings will specifically encourage ESPN to "engage in discriminatory conduct towards alternative MVPDs as a means of

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[9] *Notice* at 11.
[10] *See Ameritech Comments* at 18.
[11] Comments of Bell Atlantic and Nynex at 7.
[12] *Id.*

currying favor with TCI."[13] Although claiming that "there is already some evidence" of this phenomenon, BellSouth cites nothing more than a trade press report regarding the Fox/TCI/Cablevision deal.[14] ESPN believes that these unsupported and fanciful propositions do little to advance meaningful debate on this issue.

However, BellSouth's ultimate agenda may be more readily apparent from the written testimony offered on July 29, 1997 by William Redderson, Group President – Long Distance and Video Services for BellSouth Enterprises, to the House Subcommittee on Telecommunications, Trade, and Consumer Protection. In that testimony, BellSouth appears to advocate not only extending the program access rules to non-vertically integrated programmers, but simultaneously eliminating the *already limited* pricing flexibility contained in Section 628 as well: "Open access to programming on equal terms and conditions is the crucial risk factor that must be assured before competitors can or will invest heavily in new video facilities."[15] Upon closer inspection, the "simple changes" offered in Mr. Redderson's written testimony are really a major overhaul of the statute and its rules.

Similarly, DirecTV, Inc.'s ultimate agenda also becomes apparent *vis-à-vis* its written testimony submitted to the House Subcommittee. Like BellSouth, DirecTV appears to support extending the program access rules to non-vertically integrated programmers while simultaneously eliminating the already limited pricing flexibility opportunities remaining under Section 628. DirecTV, in fact, asked Congress in its

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[13] *Bell South Comments* at 13, n. 28.

[14] *Id.*

[15] *BellSouth Testimony* at 6 (emphasis added). ESPN interprets this to mean that BellSouth would eliminate a programmer's ability to establish different prices, terms, and

testimony to amend Section 628 "specifically to require parity with cable on programming rates, terms and conditions."[16] Like BellSouth, DirecTV's ideal program access rules would apparently eliminate a programmer's ability under Section 628 to recognize the "actual and reasonable" differences between multichannel distributors in the cost of creation, sale, delivery or transmission of programming. DirecTV's characterization of such flexibility as a mere "gap" in the law potentially rivals BellSouth's request for "simple changes."[17]

Finally, the *WCAI Comments* also urge the Commission to extend the program access rules to all cable programmers (as well as television broadcast stations), regardless of their status as vertically integrated entities.[18] Following the by now well-trod path of reciting the litany of recently announced transactions, WCAI summarily concludes that "the already extensive consolidation within the cable industry will increase to

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conditions to take into account actual and reasonable differences in the cost, creation, sale, delivery, or transmission of programming.

[16] Written Testimony of Eddy Hartenstein, President, DirecTV, Inc. before the House Subcommittee on July 29, 1997, at 5 (emphasis added). The Subcommittee was asked by DirecTV to address a "gap" in Section 628, *i.e.*, that portion of the statute expressly permitting the establishment of "different prices, terms, and conditions to take into account **actual and reasonable** differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming." We note, however, that Mr. Hartenstein's written testimony, while arguing that such "language is so broad as to undermine the intent of the law[,]" failed to include the crucial words highlighted above: "actual and reasonable." The Commission will appreciate that, read in its entirety, the language is not as broad as DirecTV might otherwise have the Subcommittee believe.

[17] It is also somewhat ironic to note that while DirecTV advocates closing various "loopholes" that "can cause much anticompetitive mischief" (*DirecTV Comments* at 5), the DBS distributor itself seems cognizant of the benefits of offering (and touting its ability to offer) attractive programming on an exclusive basis. *See* Appendix A to the *DirecTV Comments* in which DirecTV highlights its exclusive rights to NFL Sunday Ticket, MLB Extra Innings, NHL Center Ice and NBA League Pass ("Not Available on Cable!") and ESPN GamePlan and FullCourt ("Not Available on Any Other Mini-Dish Service!").

unprecedented levels"[19] leading the Commission *inevitably* to "reevaluate whether its program access rules are adequate to deter anticompetitive behavior by cable programmers."[20] (WCAI would, however, permit the Commission to initiate a rulemaking first "with the objective of adopting" such new program access rules or making recommendations to Congress to do so.[21])

In summary, ESPN believes that those advocating this major overhaul of the program access rules have offered little more than hyperbole-laden summaries of several recently announced transactions and little else in the way of a compelling rational or meaningful evidence that such a revamping is necessary.[22] While ESPN appreciates the visibility of these events, we do submit that the Commission should refrain from undertaking or recommending any regulatory or legislative revisions the effect of which will be felt well beyond the entities involved in those transactions.

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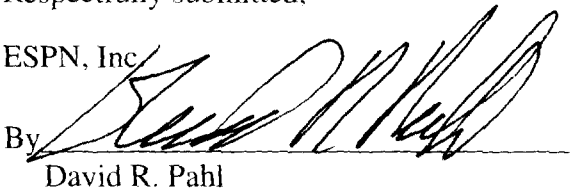
[18] *WCAI Comments* at 13.
[19] *Id.* at 3.
[20] *Id.* at 9.
[21] *Id.* at 13.
[22] The paucity of the evidence offered, in fact, seems best summarized by a statement contained in the *WCAI Comments*: "[T]he Commission is well within its authority to adopt prophylactic rules aimed at resolving problems that have not yet fully materialized, since 'a forecast of the direction in which future public interest lies necessarily involves decisions based on the expert knowledge of the agency.'" *WCAI Comments* at 13 (footnote omitted)(emphasis added).

CONCLUSION

For the reasons cited above, ESPN respectfully requests that the Commission reject the various requests contained in the above-referenced comments to support the extension of the program access rules to non-vertically integrated programmers.

Respectfully submitted,

ESPN, Inc.

By 

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